No. 79-1856

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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE EATON CORPORATION, PETITIONER

v.

OLGA J. FOX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the provision in Section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), allowing a person aggrieved by an alleged unlawful employment practice 90 days within which to file a civil action after receiving a notice from the Equal Employment Opportunity Commission informing him of his right to sue, is a statute of limitations subject to equitable tolling in certain circumstances.

2. Whether, if the 90-day period is subject to tolling, such tolling was appropriate in the particular circumstances of this case where the person aggrieved filed a civil action in state court within the 90-day period on the reasonable belief that state courts have jurisdiction of such actions.

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This brief if filed in response to the invitation of the Court to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Fox was employed by petitioner Eaton Corporation from 1942 to 1972. In August 1972, she was released from employment when the plant at which she was working closed. In October 1973, respondent brought an action in Ohio state court alleging that petitioner had violated a collective bargaining agreement by failing properly to compute her time spent on maternity leave in determining her eligibility for early retirement (Pet. App. 6a).

In 1974, after respondent filed a charge with and received a notice of her right to sue from the Equal Employment Opportunity Commission, she amended her state court complaint to add an allegation that petitioner had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by not giving her credit for the period she had been on maternity leave (Pet. App. 6a). Prior to trial, petitioner stipulated that respondent had a right to assert her Title VII claim in state court (*ibid*).

Following a trial on the merits, the state court entered judgment in favor of petitioner. That judgment was affirmed by the Court of Appeals of Ohio (Pet. App. 6a). On appeal to the Supreme Court of Ohio, that court, *sua sponte,* held that state courts lack subject-matter jurisdiction of Title VII claims. Accordingly, the Ohio Supreme Court, on December 15, 1977, reversed the lower court judgment in favor of petitioner and dismissed the Title VII action for lack of jurisdiction (Pet. App. 6a; 48 Ohio St. 2d 236 (1976)).

2.a. On February 18, 1977, respondent refiled her Title VII claim in the United States District Court for the Northern District of Ohio. Petitioner filed a motion to dismiss on

the ground that respondent had not commenced the action in federal court within 90 days of receiving her right to sue letter, as required by 42 U.S.C. 2000e-5(f)(1). The district court granted the motion, holding that it lacked subject-matter jurisdiction because the Title VII claim had not been asserted in federal court within 90 days after receipt of the notice of right to sue (Pet. App. 3a).

b. The court of appeals reversed and remanded for further proceedings (Pet. App. 13a). The court unanimously held that the 90-day time limit for filing suit in federal court is in the nature of a statute of limitations and is subject to equitable tolling (Pet. App. 7a, 13a). The court further held, one judge dissenting, that tolling was appropriate in the circumstances of this case because respondent had acted with "great diligence" (Pet. App. 12a) in asserting her Title VII claim and because she had a "reasonable basis" for believing that state courts have jurisdiction to decide Title VII case (*ibid.*).[1] The court of appeals did not decide whether state courts have jurisdiction of Title VII claims; it concluded only that respondent reasonably could have believed that they do, noting that state and federal courts are divided on the question and that "the question * * * is not an easy one, particularly given the absence of any language in [Title VII] specifically excluding jurisdiction from the state courts" (Pet. App. 10a n.7).

The court also noted that because the record does not indicate whether respondent's administrative charge of discrimination had been timely filed with the EEOC and

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[1]Judge Celebrezze, dissenting, stated that he agreed with the principle that Title VII time limitations are in the nature of statutes of limitations and that equitable principles should apply in circumstances which warrant their application; but on the facts of this case, he found no equitable basis for tolling the 90-day time period (Pet. App. 13a-14a).

because the district court did not address this question in granting petitioner's motion to dismiss, this "issue will have to be determined by the district court on remand" (Pet. App. 6a n.1).

DISCUSSION

This case involves only the application of the tolling doctrine to the 90-day period within which the person aggrieved may file a civil action after receiving a notice from the EEOC of his right to sue. 42 U.S.C. 2000e-5(f)(1). No question is presented regarding the tolling of the initial 180-day or 300-day period for filing an administrative charge with the EEOC under 42 U.S.C. 2000e-5(b)—the issue involved in most of the Title VII tolling cases. The district court must determine on remand whether respondent filed a timely charge with the EEOC (Pet. App. 6a n.1). If respondent's charge filed with the EEOC was not filed within the applicable period and no reason appears for excusing her from complying with the filing requirements, the district court will be required to dismiss the suit. This would, of course, moot the question whether the 90-day suit-filing period could be tolled in the circumstances of this case.

In any event, the court of appeals correctly held that the 90-day period within which a suit may be filed under 42 U.S.C. 2000e-5(f)(1) after receipt of a notice of right to sue is a period of limitations subject to tolling in appropriate circumstances. Whether the tolling doctrine was properly applied in the peculiar circumstances of this case is a fact-bound question that does not warrant review by this Court. Review of this case is especially inappropriate because the

question whether state courts have jurisdiction of Title VII claims is now before the Court in *Minnick* v. *California Department of Corrections*, No. 79-1213 (argued Dec. 2, 1980). If this Court holds, as we argue in our brief in *Minnick* (at 11-15),[2] that state courts do not have jurisdiction of Title VII claims, future litigants could not fairly assert a reasonable belief to the contrary that would justify tolling of the 90-day limitations period. If, on the other hand, the Court holds that state courts have jurisdiction of Title VII claims, state courts will not dismiss for lack of jurisdiction and there will be no occasion to toll the limitations period in order to render timely a subsequent filing in federal court. In any event, given the uncertainty on the question of state court jurisdiction, and petitioner's stipulation that respondent could bring her action in state court, tolling was appropriate in this case.

1. This Court has recognized that federal courts ordinarily have the equitable power to excuse compliance with statutorily established periods for the commencement of actions in appropriate circumstances. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965); cf. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *Herb* v. *Pitcairn*, 325 U.S. 77 (1945). Indeed the principle is so deeply embedded in our jurisprudence that it must be assumed to apply to a particular limitations period

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[2]We are furnishing copies of our brief in *Minnick* to the parties in this case.

in the absence of an indication to the contrary in the language or legislative history of the statutory provision. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 234-235 (1959).[3]

There is nothing in the language or legislative history of Title VII to overcome the presumption that tolling principles should be applied in the Title VII context. To the contrary, in introducing the House version of Title VII in the Senate, the bill's sponsors stated that the "suit against the respondent * * * brought by * * * the complaining party, would proceed in the usual manner for litigation in the Federal courts." 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); see also *id.* at 7213 (interpretive memorandum submitted by Senators Clark and Case). Although the House version of Title VII was later amended on the Senate floor (see *Teamsters* v. *United States*, 431 U.S. 324, 352 (1977)), the amendments strengthened—not weakened—the private right of action and made private suits the primary method of obtaining judicial enforcement of Title VII.[4]

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[3]This Court has likewise rejected the contention that where the same statute both creates a cause of action and establishes a limitation on the time within which the cause of action may be brought, " 'the time limitation is an integral part of [the] new cause of action . . . that * * * is irretrievably lost at the end of the statutory period.' " *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 559, quoting *Glus* v. *Brooklyn Eastern Terminal, supra*, 359 U.S. at 232. See also *Burnett* v. *New York Central R.R., supra*, 380 U.S. at 427 n.2. Thus, the fact that Title VII both creates a right of action and provides a 90-day period for the filing of a suit does not suggest that the cause of action is "irretrievably lost," as a jurisdictional matter, at the end of the 90 day period.

[4]As Senator Humphrey explained them, the Senate amendments removed a provision in the House bill requiring that an individual obtain prior permission from a Commission member before bringing suit, Section 707(c) of H.R. 7152 (1963) (110 Cong. Rec. 12721 (1964)); added a provision authorizing courts to award attorneys' fees to private

In the final version of Title VII, Congress made the "private right of action * * * an essential means of obtaining judicial enforcement of Title VII." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Congress also recognized that in bringing a private Title VII action, the "plaintiff is * * * vindica[ting] 'a policy * * * considered of the highest priority.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

In 1972, when Congress amended Title VII to authorize the EEOC to bring suit,[5] it was careful to retain the private right of action because, in its view, the "primary concern should be to protect the aggrieved person's option to seek a prompt remedy." S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1941); see also Section-by-Section Analysis of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972); *General Telephone Co.* v. *EEOC*, No. 79-488, (May 12, 1980) slip op. 7.[6] This uniform congressional emphasis on the importance of the right of individuals to seek judicial redress under Title VII is contrary to the notion that Congress intended to deprive Title VII plaintiffs of the benefits of the tolling doctrine that has been applied generally under other federal statutes.[7]

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plaintiffs (110 Cong. Rec. 12724 (1964)); and removed a provision in the House bill authorizing suit by the Equal Employment Opportunity Commission (110 Cong. Rec. 12721 (1964)).

[5]*See Occidential Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977).

[6]The history of congressional concern for individual rights under Title VII surely is more compelling than that relied upon by the Court in *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 559, n.29, to bolster the conclusion that generally accepted tolling principles should apply in cases brought under the antitrust laws.

[7]This Court also has emphasized that federal courts, in exercising the broad equitable powers granted by Title VII, possess ample authority " 'to locate "a just result" in light of the circumstances peculiar to the case.' " *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 373 (1977), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424-425 (1975), and *Langnes* v. *Green*, 282 U.S. 531, 541 (1931).

Against this background, it is not surprising that this Court appears to have given 42 U.S.C. 2000e-5(f)(1) its natural reading as providing a 90-day statute of limitations for the filing of a civil action, not as placing limitations on the subject matter jurisdiction of the district court. In *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), the Court observed that the complainant had commenced his action in federal district court 91 days after the EEOC formally advised him of his right to sue but that the employer "did not assert [the complainant's] failure to file the action within 90 days as a defense" (slip op. 3 & n.9).[8] If satisfaction of the requirement of filing within the 90-day period were regarded as jurisdictional, then the employer's failure to raise non-compliance with this requirement as a defense would not have disposed of the defect. Thus, the Court appears to have viewed the 90-day period as a statute of limitations, which must be asserted as an affirmative defense or be lost. Fed. R. Civ. P. 8(c), 8(d), and 12(b).

This view of the 90-day suit-filing period is consistent with this Court's characterization of the 180-day or 300-day period for the initial filing of a charge of discrimination with

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[8]In its supplemental memorandum (at 5-7), petitioner suggests that *Mohasco* furnishes some support for its position that tolling was inappropriate in this case. *Mohasco*, however, involved the initial charge-filing period, not the 90-day period for filing a civil action after the EEOC has considered the matter. Moreover, as petitioner acknowledges (Supp. Memo. 6-7), there was no discussion of the equitable tolling doctrine in *Mohasco*, no doubt because there was no allegation in that case that the complainant had relied on the EEOC regulation at issue there. *Mohasco* concerned the broader question whether the literal language of 42 U.S.C. 2000e-5(b) and (d) requiring the filing of a charge with the EEOC within 300 days in deferral states should be displaced in an entire category of cases (where the complainant filed a charge with the state agency within 300 days), irrespective of the equities of the particular case.

the EEOC as a statute of limitations. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371-372 (1977);[9] see also *Delaware State College* v. *Ricks*, No. 79-939 (Dec. 15, 1980), slip op. 6-11; *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 241-244 (1976) (characterizing the 180-day or 300-day charge-filing period as a "limitations period"). Because the charge-filing and suit-filing periods are statutes of limitations, and in view of the absence of any expression of legislative intent to the contrary, they may be tolled under proper circumstances.[10] This conclusion is especially appropriate under Title VII, "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman*, 404 U.S. 522, 527 (1972).[11]

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[9]A principal issue in *Occidental Life Insurance Co.* v. *EEOC* was whether state statutes of limitations should govern the bringing of a civil action by the EEOC. 432 U.S. at 366-372; *id.* at 373-384 (Rehnquist, J., dissenting). It would seem to follow that the 90-day period within which a private party may bring such a civil action also should be viewed as a period of limitations.

[10]This Court has indicated that the filing of a timely charge with the EEOC is a "jurisdictional prerequisite" to the filing of a civil action under 42 U.S.C. 2000e-5(f)(1). *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 240; *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47; see also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977) ("[t]imely filing is a prerequisite to the maintenance of a Title VII action"). These cases do not suggest, however, that a charge may never be considered "timely" for this purpose if it is filed outside the applicable 180-day or 300-day charge-filing period. If those periods are viewed as statutes of limitation, as the Court has indicated they should be, a charge filed after their expiration could nonetheless be regarded as "timely" for purposes of invoking the EEOC's processes (and later the jurisdiction of the federal courts) if the limitations period were properly extended under the doctrine of equitable tolling. In those circumstances, the person aggrieved would have satisfied the "jurisdiction prerequisite" of exhausting his administrative remedies in a timely fashion, in accordance with the opinions cited above.

[11]It may be that the occasions on which tolling is proper may be far more limited with respect to the 90-day period for filing a civil action, because that period will have been commenced by receipt from the EEOC of a notice of a right to sue explaining the steps the individual must follow. The person aggrieved may not have the benefit of similar advice or assistance before he first files a charge with the EEOC to initiate Title VII's processes.

Perhaps for this reason, the Court appears to have acknowledged that equitable tolling of the Title VII limitations periods may be appropriate in certain circumstances. *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 237 & n.10.

Nor, contrary to petitioner's contention (Pet. 7-9), is this Court's holding in *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 236-240, that the period for filing a charge with the EEOC may not be tolled during the pendency of grievance procedures, inconsistent with the recognition of general principles of tolling under Title VII. The Court there rejected the assertion that the charge-filing period should be extended as a matter of course in an entire category of cases—all those in which grievance procedures have been invoked. This broad proposition is far different from applying the well-settled equitable doctrine that concededly applicable limitations periods may be tolled in the circumstances of an individual case where the equities require.

Moreover, there is now an "emerging consensus" that "Title VII filing periods are subject to equitable extension." *Cooper* v. *Bell*, 628 F. 2d 1208, 1212 (9th Cir. 1980). See *Hart* v. *J.T. Baker Chemical Co.*, 598 F. 2d 829, 832-33 (3d Cir. 1979); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 469 F. 2d 268, 269) (4th Cir. 1974), cert. denied, 410 U.S. 939 (1973); *Chappell* v. *Emco Mach. Works Co.*, 601 F. 2d 1295, 1297-1302 (5th Cir. 1979); *Harris* v. *Walgreen's Distribution Center*, 456 F. 2d 588, 592 (6th Cir. 1972); *Bethel* v. *Jefferson*, 589 F. 2d 631, 641-42 (D.C. Cir. 1978). Several other courts of appeals have left the question open, concluding that the failure to comply with the time limitations could not, in any event, be excused in the circumstances of the particular case. See, *e.g.*, *Daughtry* v. *King's Dept. Stores, Inc.*, 608 F. 2d 906 (1st Cir. 1979); *Cottrel* v. *Newspaper Agency Corp.*, 590 F. 2d 836, 838 (10th Cir. 1979); *Keyse* v.

California Texas Oil Corp., 590 F. 2d 45, 47 (2d Cir. 1978); *Smith* v. *American President Lines*, 571 F. 2d 102, 109 (2d Cir. 1978).[12]

Thus, the court of appeals correctly determined that the time limitations in Title VII may be tolled in appropriate circumstances, and no clear division among the circuits is presented on this question. Review by the Court of this issue therefore is not warranted.

2. The question whether the suit-filing period was properly tolled in the peculiar circumstances of this case—where respondent filed her Title VII action in state court within the 90-day period and petitioner stipulated that she was entitled to bring her action there—does not warrant review by this Court. The legal question whether state courts have jurisdiction of Title VII actions, which underlies the tolling issue in this case, may be resolved by the Court's decision in *Minnick* v. *California Department of Corrections*, *supra*. There would then be no cases in the future involving an erroneous filing in state court on which a tolling claim could be based.

In any event, the court of appeals' decision in this case is fully consistent with this Court's decision in *Burnett* v. *New York Central R.R.*, *supra*. In that case, a state court dismissed the FELA plaintiff's action because venue was improper, and his subsequent filing in federal district court

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[12]There is, however, language in several Ninth Circuit decisions, indicating that the 90-day suit filing period is "jurisdictional." See *Cooper* v. *Bell*, *supra*, 628 F. 2d at 1213, and cases cited. But these characterizations do not appear to have been essential to the decision in the cases, either because the suit-filing period was not actually involved, *ibid.*, or because the circumstances would not have warranted excusing compliance with the limitations period in any event. *Mahroom* v. *Hook*, 563 F. 2d 1369, 1374-1376 (9th Cir. 1977); *Cleveland* v. *Douglas Aircraft Co.*, 509 F. 2d 1027, 1030 (9th Cir. 1975); *Wong* v. *The Bon Marche*, 508 F. 2d 1249, 1250-1251 (9th Cir. 1975). This language is, moreover, inconsistent with the language, legislative history, purposes, and judicial construction of Title VII discussed in the text.

occurred after the expiration of the applicable limitations period. The Court nevertheless held the federal filing timely, observing that the injured worker did not sleep on his rights and that the railroad could not have relied upon the policy of repose embodied in the limitations period because it was aware that the plaintiff was actively pursuing his FELA remedy. 380 U.S. at 429-430; see also *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 558. The same is true in the instant case. Respondent did not sleep on her rights: she pursued her Title VII remedy in state court well within the 90-day limitations period. And here, not only did petitioner not rely on the policy of repose embodied in the limitations period—it stipulated to her right to bring the action in state court and litigated its Title VII liability there. And here, unlike in *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 237-238, respondent was not pursuing a separate cause of action in her initial filing. She merely asserted "the same statutory claim in a different forum" and "[gave] notice to [petitioner] of that statutory claim." *Id.* at 238. Tolling of the limitations period is appropriate in these circumstances. This is especially so given the uncertainty with respect to state court jurisdiction of Title VII claims,[13] thereby rendering reasonable respondent's belief that state courts have jurisdiction. See Pet. App. 10a-11a; cf. *Charles Dowd Box Co.* v. *Courtney*, 366 U.S. 502 (1962).[14]

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[13]Prior to the Ohio Supreme Court's decision in 1976, the only reported opinion holding that state courts lack jurisdiction of Title VII claims was the decison of the state trial court in *Lucas* v. *Tanner Bros. Contracting Co.*, 10 Fair Empl. Prac. Cas. Cases 1104 (Ariz. Sup. Ct. 1974).

[14]We note that the right-to-sue letter the EEOC sent to respondent informed her of her right to "institute a civil action in the United States District Court having jurisdiction over your case" (48 Ohio St. 2d at 237-238). The letter did not state, however, that federal jurisdiction is exclusive. As we have pointed out (see pages 3-4, *supra*), we have taken the position in *Minnick* v. *California Department of Corrections* that state courts do not have Title VII jurisdiction. The only issue presented here, however, is whether respondent reasonably believed that they do. There is therefore no occasion to hold the petition in this case pending a decision in *Minnick*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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